

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LUTHER A. TINSLEY,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
NY07542610171

DATE: JUN 11 1967

Peter B. Broida, Esquire, Passman & Broida, Washington,
D.C., for the appellant.

Stuart D. Rick, Esquire, Washington, D.C., for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Donovan, Member

OPINION AND ORDER

Appellant has petitioned for review of a May 13, 1966, initial decision which sustained a suitability determination of the Office of Personnel Management (OPM). For the reasons discussed below, the petition for review is GRANTED under 5 U.S.C. § 7701(e)(1), the initial decision is AFFIRMED in part, REVERSED in part, and the case is REMANDED to the Boston Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

Appellant appealed to the Board's New York Regional Office from a suitability determination of the Office of Personnel Management (OPM), finding him unsuitable for federal employment in the competitive service as a construction inspector and ordering his removal from the position of realty specialist with the Department of the Army.¹ Specifically, OPM charged that appellant's conduct in prior employment failed to establish that he possessed the high standards of honesty and integrity required for federal employment and that his history of financial irresponsibility indicated lack of good judgment, responsibility, and trustworthiness. The suitability determination was based on the results of an investigation revealing, among other things: (1) That appellant was discharged from the position of public inspector with the City of Davenport, Iowa, in 1983, based on alleged abuse of his position when he resorted to abusive and derogatory language with a property owner whose apartment he was inspecting;² (2) that appellant admitted submitting

¹ As part of its suitability determination, OPM also barred appellant from competing for or accepting appointment to competitive service positions until December 18, 1988. See Appeal File, Tab 6(12).

² The investigation also revealed that appellant received three written warnings from April to May of 1983 concerning three other instances of misconduct which included: (1) A charge of improper use of the telephone when appellant listed the City's phone as a contact for his private business; (2) a charge of conflict of interest based on appellant accepting money to repair a housing violation which he cited as a housing inspector; and (3) a charge of conducting private business during working hours. See Appeal File, Tab 6(12).

fraudulent travel vouchers amounting to \$5,995.00 while employed with the Army Corps of Engineers and entered into a pre-trial agreement with the U.S. Attorney's Office which required full restitution in exchange for not prosecuting; (3) that appellant incurred miscellaneous traffic violations and was charged with assault and battery; (4) that civil actions involving money judgments were rendered against appellant and records indicated that several judgments were filed and numerous accounts were placed against him for collection; and (5) that appellant was discharged from the Air Force during his probationary period for unsatisfactory performance. See Appeal File, Tab 6(12).

In an initial decision, the administrative judge sustained the removal action, finding: (1) That the charges were supported by preponderant evidence; (2) that appellant's admitted falsification of government travel vouchers and other past misconduct made him unsuitable for federal employment; and (3) that his removal promotes the efficiency of the service.³

Appellant now petitions for review of that decision and raises four allegations. While not addressing the merits of the suitability determination, appellant requests that the initial decision be reversed outright or, in the alternative, remanded to remedy the administrative judge's alleged improper

³ Appellant also raised an issue of race discrimination, but the allegation was dismissed on the agency's motion because appellant offered no evidence to support this allegation. See Initial Decision at 1 n.1. This issue is discussed in the body of this Opinion and Order. See *infra* at 9.

entry of summary judgment⁴ against appellant on his race discrimination claim and for the resumption of discovery and rehearing after full discovery is completed.

ANALYSIS

1. The Administrative Judge Properly Denied Appellant's Discovery Requests.

Appellant contends that the administrative judge improperly denied him discovery by refusing to compel the agency to produce certain OPM regulations and internal OPM guidelines pertinent to suitability determinations. Appellant also alleges that the administrative judge erred in denying his request for case summaries of all OPM suitability determinations raising charges similar to the charges under which appellant's removal was based.⁵ We disagree.

The Board will not find reversible error in an administrative judge's discovery ruling absent a showing that

⁴ We note that appellant's counsel contends that the administrative judge erred in "entering summary judgment" against appellant on his allegation of race discrimination. This is an inaccurate characterization of the motion ruled on by the administrative judge. The record clearly reflects that the administrative judge ruled on a motion to dismiss made by the agency. See Hearing Tape, 1-A; Initial Decision at 1 n.1. This factor is significant because the Board does not have available to it a summary judgment proceeding. See *Crispin v. Department of Commerce*, 732 F.2d 919, 922 (Fed. Cir. 1984).

⁵ Appellant's specific request was for copies of all regulatory material in the form of OPM guidelines and regulations governing suitability determinations and summaries of all cases where agencies were directed to take adverse action against their employees and those in which agencies were not directed to take adverse action against their employees concerning similar charges. See Appeal File, Tab 11.

the administrative judge abused his or her discretion in making the ruling. See *Esparza v. Department of the Air Force*, 22 M.S.P.R. 186 (1984). In the present case, there is an insufficient showing that the administrative judge abused her discretion with respect to her discovery rulings. The agency guidelines appellant requested are a matter of public record in the form of Federal Personnel Manual issuances and supplements distributed widely to libraries accessible to the public, particularly in Washington, D.C., where appellant's attorney is located. See Federal Personnel Manual, Chapter 731. Moreover, the Board's regulations limit the scope of discovery to "any nonprivileged matter which is relevant to the issues involved in the appeal." See 51 Fed. Reg. 25,155 (1986) (to be codified at 5 C.F.R. § 1201.72(b)).⁶ Relevancy has been defined to include information which appears reasonably calculated to lead to the discovery of admissible

⁶ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

evidence. See 5 C.F.R. § 1201.72(a).⁷ In the present case, there was no such showing of relevancy.

Since OPM is required to follow its published guidelines and regulations in making its suitability determinations, see 5 C.F.R. § 731.202(d), any internal guidelines that differed from the published issuances would be inapplicable, and therefore would not have any relevance to a determination as to the merits of this action. Appellant's requests for the internal guidelines and summaries in connection with his alleged claim of unevenness in "enforcement" would have no impact on the outcome of his appeal as long as the suitability determination was otherwise reasonable. In view of the seriousness of appellant's alleged misconduct, we find that OPM's suitability determination would be appropriate, despite the existence of unevenness in treatment, and that such unevenness, even if it were shown, would not affect the Board's decision in the outcome of the appeal. See 5 C.F.R. § 731.202(b); cf. *Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182, 93 S. Ct. 1455, 1458-59 (1973) (employment of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases); *Schapansky*

⁷ We note also that the administrative judge extended the time of discovery to appellant initially. There is no basis for finding that she abused her discretion in denying appellant's later request to extend it further. See Appeal File, Tabs 14 and 26. These rulings are consistent with the Board's regulatory requirements for completing the discovery process in a timely manner. See 5 C.F.R. § 1201.73(d)(5).

v. *Department of Transportation, Federal Aviation Administration*, 735 F.2d 477, 485 (Fed. Cir. 1984) (unevenness in application of a penalty is not a ground for invalidating it).⁸

Accordingly, we conclude that the administrative judge did not abuse her discretion in making the discovery rulings at issue. See Appeal File, Tab 26.

2. The Administrative Judge Properly Denied Appellant's Request to Impose Sanctions on OPM for Submitting Answers to Interrogatories Signed by an OPM Attorney.

Appellant contends that the administrative judge erred by not applying sanctions against the age^r , for failing to comply with his discovery requests. Specifically, appellant alleges that OPM should be sanctioned because it responded to interrogatories with answers signed by its own attorneys rather than the specific person making the suitability determination. We disagree.

⁸ We note that the administrative judge ruled that internal OPM issuances are otherwise available documents. See Appeal File, Tab 26. While such documents may be available through other means such as a Freedom of Information Act request or an order to compel discovery, such documents are not part of the "public domain" in the same manner that FPM issuances are available. Appellant has not shown, however, that any error by the administrative judge in this regard resulted in prejudice to his substantive rights because he does not state how these documents would lead to resolution of the issue of whether OPM made a correct suitability determination. See *Karapinka v. Department of Energy*, 6 MSPB 114, 116 (1981) (the Board will not grant a petition for review when the appellant has failed to show any prejudicial error denigrating the appellant's substantive rights resulting from the administrative judge's conduct of the appeal).

The Board regards the Federal Rules of Civil Procedure as instructive, rather than controlling, with respect to discovery procedures governing appeals. See *Hatley v. Veterans Administration*, 9 M.S.P.R. 585, 588 (1982). Moreover, the Federal Rules of Civil Procedure do not require that an attorney certify answers to interrogatories addressed to a government agency. See Federal Rules of Civil Procedure, Rules 26(g) and 33(a). Under Rule 33(a), an attorney of a government agency, such as the OPM attorney who signed the interrogatories in the present case, is permitted to sign answers to interrogatories addressed to an agency, regardless of whether the attorney has first-hand knowledge of the facts contained therein. See J. Moore, J. Lucas, D. Epstein, *Moore's Federal Practice*; § 33.07 (2nd Ed. 1982). Thus, appellant has failed to show that the administrative judge abused her discretion in refusing to grant his request for sanctions. See *Rana v. Department of Defense*, 27 M.S.P.R. 678 (1985).

3. OPM Had the Regulatory Authority to Conduct the Suitability Investigation and to Instruct the Army to Remove the Appellant as Unsuitable.

Appellant contends that OPM does not have authority to take this action because it may only conduct suitability investigations where there is an appointment into the competitive service -- not where there is merely a promotion as appellant alleges in the present case. Although OPM does not have jurisdiction to conduct a suitability investigation

based on a promotion, it clearly does have jurisdiction over investigations into appointments to a position in the competitive service. See 5 C.F.R. § 731.301(a)(i). In this case, appellant received an appointment to a competitive service position. He was appointed from the excepted service position of writer-editor to the competitive service position of realty specialist. See Appeal File, Tab 28. That the appointment was made as a temporary, limited appointment does not alter the fact that the position was in the competitive service. See *Fish v. Department of the Navy*, 29 M.S.P.R. 595, 597 (1985). Thus, appellant has not established that what occurred here was a promotion rather than an appointment into the competitive service subject to OPM investigation. See 5 C.F.R. § 731.301. Accordingly, appellant's allegation that OPM has no authority in this regard is unsupported.

4. The Administrative Judge Erred In Dismissing Appellant's Allegation of Race Discrimination.

Appellant contends that the administrative judge improperly denied him a hearing on his allegation of race discrimination when she entered summary dismissal against him on that issue. See Initial Decision at 1. While appellant argues that dismissal of this allegation before he had the opportunity to testify on it was clearly improper, he provides no elaboration on the substance of what his testimony would specifically concern. See Petition for Review at 10 n.1. Moreover, appellant does not dispute the administrative judge's finding that, during the pre-hearing conference, he

said that he believed he was being discriminated against by the employing agency, and not by OPM who instructed the agency to remove appellant as unsuitable. Further, while appellant notes in his response to OPM's interrogatories that he believed he was discriminated against, he also states that he believed the agency was motivated to terminate him to cover a "fatal management error." See Appeal File, Tab 22.


Notwithstanding these factors, we find that the record is insufficiently developed to support a clear finding that appellant's allegation of race discrimination was against the employing agency rather than OPM and that the case should be remanded for further proceedings on this issue. On remand, if it is determined that appellant's claim of race discrimination is against the employing agency rather than OPM, the regional office should dismiss the discrimination claim, since the employing agency is not a party in this appeal. However, if the claim is against OPM, the regional office should hold a hearing to the extent that the claim of discrimination involves OPM's decision to find appellant unsuitable.⁹

⁹ We note that the administrative judge's ruling on the agency's motion to dismiss appellant's allegation of race discrimination could be viewed as a sanction against appellant for not fully responding to the agency's interrogatories on this allegation. See Hearing Tape, 1-A. While we would view such a ruling as too severe, see *Moody v. Department of the Air Force*, 30 M.S.P.R. 9, 10 (1986), we decline to construe the administrative judge's ruling as a sanction unless it is specifically identified as such. See *Crispin v. Department of Commerce*, 732 F.2d at 923. The tape of the hearing indicates that the agency made a "motion to dismiss" appellant's allegation of race discrimination and the administrative judge identified it as such. See Initial Decision at 1 n.1.

ORDER

Accordingly, this case is remanded to the Boston Regional Office to hold a supplemental proceeding limited to appellant's original claim of race discrimination and to provide appellant with the opportunity to submit relevant and material evidence on this issue. The administrative judge shall provide the agency with an opportunity to rebut this evidence, and shall issue a supplemental initial decision solely on appellant's affirmative defense of race discrimination.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.